No. 10-263

In the Supreme Court of the United States

SONY MUSIC ENTERTAINMENT,
FKA SONY BMG MUSIC ENTERTAINMENT, ET AL.,
Petitioners,

v.

KEVIN STARR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In their Fed.R.Civ.P. 12(b)(6) motions to dismiss a claim for agreement to fix prices in violation of Section 1 of the Sherman Antitrust Act, Defendants failed to articulate how certain of the alleged facts could be considered independent, self-interested conduct. *E.g.*, (1) the chief executive of one Defendant admitted that the Defendants had formed joint ventures expressly so that "we [the music industry] determine" and control prices; and (2) the chief executive of another Defendant admitted that the Defendants placed their parallel "most favored nations" clauses in "secret side letters" because "there are legal/antitrust reasons why it would be bad idea to have MFN clauses in any, or certainly all, of these agreements."

In rejecting Defendants' factually incomplete arguments, the Court of Appeals for the Second Circuit quoted from and applied this Court's standards for pleading plausible grounds to infer an illegal agreement under Rule 8 of the Federal Rules of Civil Procedure, as recently articulated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), to **fourteen separate facts** which it found were probative of a prior agreement to fix prices. Defendants' arguments for rehearing or rehearing *en banc* were unanimously rejected. Pet.App.30a-31a.

In such motions, Defendants also failed to cite to *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), and to argue (as they do here) that Fed.R.Civ.P. 8 requires a plaintiff "to allege those facts

in a complaint that the plaintiff will later need to substantiate at summary judgment or prove at trial."

Question #1. Where Defendants failed even to try to articulate how their chief executives' inculpatory admissions are consistent with independent action, have Defendants satisfied their burden as movants on a Fed.R.Civ.P. 12(b)(6) motion to dismiss?

Question #2. In light of this Court's express rejection in *Twombly* and *Iqbal* of a "probability" standard under Rule 8, did the court of appeals err in concluding that Plaintiffs alleging a conspiracy under Section 1 of the Sherman Act were not required to plead facts which satisfy a probability standard, to-wit, which "tend to rule out even the **'possibility'** that independent self-interested conduct" is an explanation for Defendants' parallel behavior?

Question #3. Where Defendants failed to articulate below the sole question presented by the Petition --- whether, under Rule 8, a complaint must allege "sufficient facts that, if proved, plausibly show an entitlement to relief under the substantive legal standard that will govern the claim at summary judgment or trial" --- should this Court follow its usual practice and decline to consider the question in the first instance?

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 2008-2009, the United States took unprecedented actions to try to stop the snowball of deleterious effects from too much capitalism and efficiency and not enough law, deterrence, and individual character. *Compare, e.g.*, Richard A. Posner, THE CRISIS OF CAPITALIST DEMOCRACY, (Harvard University Press, 2010) (reliance on corporate self-interest and the market to police wrongdoing, and discouragement of judicial and regulatory deterrence, were mistaken) *with* Richard A. Posner, THE FAILURE OF CAPITALISM, (Harvard University Press 2009) (same).

Seeking to shift the imbalance of efficiency over law further in the wrong direction, the Petitioners-Defendants ("Defendants") moved under Fed.R.Civ.P. 12(b)(6) to have the courts below dismiss price-fixing conspiracy charges against Defendants, and Defendants

> (a) did not deign to mention, much less try to explain, the alleged inculpatory admissions of two of Defendants' chief executives (Pet.App.16a-17a), and
>
> (b) effectively argued for the "probability" standard that was expressly rejected in *Twombly,* 550 U.S. at 556.

Such inculpatory admissions were that Defendants originally combined together to determine and control prices and later each engaged in the highly unusual

behavior of hiding most-favored-nations clauses in side agreements due to antitrust concerns. Second Consolidated Amended Complaint ("complaint" or "C") ¶¶86,95;Pet.App.93a, 95a.

In rejecting Defendants' factually incomplete arguments, the Court of Appeals for the Second Circuit quoted from and applied this Court's standards for pleading plausible grounds to infer an illegal agreement under Rule 8 of the Federal Rules of Civil Procedure, as recently articulated in *Twombly* and in *Iqbal,* to **fourteen separate facts** which it found were probative of a prior agreement to fix prices. Defendants' arguments for rehearing or rehearing *en banc* were unanimously rejected. Pet.App.30a-31a.

Defendants are the four largest music labels. C¶40;Pet.App.79a. Respondents-Plaintiffs ("Plaintiffs") allege that Defendants agreed and conspired to fix prices and other terms for music sold as digital files ("Digital Music"). C¶2;Pet.App.68a. The primary means of delivery of Digital Music are: (1) online via the Internet ("Internet Music"); and (2) compact discs ("CDs"). *Id.* Plaintiffs allege that, by uniformly requiring Plaintiffs and other purchasers of Digital Music to pay identical supracompetitive prices and to agree to identical idiosyncratic and unpopular digital rights management ("DRM") terms of use, Defendants actually sought to discourage the purchase of their Internet Music so as to protect and increase their CD sales. C¶¶66,82,105;Pet.App.85a,90a,97a-98a.

Defendants have a history of alleged antitrust violations.[1]

Consistent with their history of alleged anticompetitive behavior, the chief executive officer of one Defendant explained that the formation of Defendants' "pressplay" Internet Music joint venture was for the purpose of determining and controlling prices. Pet.App.16a.

Consistent with their history of alleged anticompetitive behavior, the chief executive officer of another Defendant decided that his company's "most favored nations" ("MFN") agreement with Defendants' joint venture MusicNet (which assured that each Defendant's core terms would be no less favorable than those of the other Defendants) would be placed in "a secret side letter" because "there are legal/antitrust reasons why it would be a bad idea to have MFN clauses in any, or certainly all, of these agreements." Pet.App.16a-17a.

Consistent with their history of alleged anticompetitive behavior, Defendants in about May 2005 raised wholesale prices from about $0.65 per song to $0.70 per song, "even though earlier that year defendants' costs of providing Internet Music had decreased substantially due to completion of the initial cataloging of all Internet Music and technological

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[1] *E.g., In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (finally approving settlement); *In re Sony Entm't, Inc.*, No. C-3971, 2000 WL 1257796 (F.T.C. Aug. 30, 2000) (consent decrees against distributor defendants); *In re Compact Disc Litig.*, MDL No. 1216 (C.D.Cal. 1997); *Ottinger v. EMI Music Distrib.*, No. 24865-II (Tenn. Cir. Ct.).

improvements that reduced the cost of digitizing new releases." Pet.App.17a.

In addition to the foregoing, the Second Circuit in its decision below (the "Decision") cited to the following "non-conclusory factual allegations" of the complaint as providing plausible grounds for inferring an illegal agreement:

- Defendants agreed to launch the joint ventures MusicNet and pressplay, both of which charged unreasonably high prices and contained similar DRMs. Pet.App.14a.

- None of the defendants dramatically reduced their prices for Internet Music (as compared to CDs), despite the fact that all defendants experienced dramatic cost reductions in producing Internet Music. *Id.*

- When defendants began to sell Internet Music through entities they did not own or control, they maintained the same unreasonably high prices and DRMs as MusicNet itself. *Id.*

- Defendants used MFNs in their licenses that had the effect of guaranteeing that the licensor who signed the MFN received terms no less favorable than terms offered to other licensors. *Id.*

- According to the executive director of the Digital Music Association, seller-side MFNs such as those alleged here are "inherently price-increasing and anticompetitive." Pet.App.17a.

- Defendants used the MFNs to enforce a wholesale price floor of about 70 cents per song. Pet.App.15a.

- All Defendants refuse to do business with eMusic, the # 2 Internet Music retailer. *Id.*

- In or about May 2005, all defendants raised wholesale prices from about $0.65 per song to $0.70 per song, an increase enforced by MFNs. *Id.*[2]

- Defendants control over 80% of Digital Music sold to end purchasers in the United States. Pet.App.16a.

- An industry commentator noted that "nobody in their right mind" would want to use MusicNet or pressplay, suggesting that some form of agreement among Defendants would have been needed to render the enterprises profitable. *Id.*

- Whereas eMusic charges $0.25 per song, Defendants' wholesale price is about $0.70 per song. Pet.App.17a.

- Defendants' price-fixing is the subject of a pending investigation by the New York State

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[2] The Second Circuit included the allegations in proposed amended ¶ 99 of the complaint, which amendment contained "enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement," and thus had erroneously been denied by the district court. Pet.App.15a n. 3 (citing *Twombly*, 550 U.S. at 556).

> Attorney General and two separate investigations by the Department of Justice. *Id.*[3]

In sum, the Second Circuit concluded that "[t]he present complaint succeeds where *Twombly*'s failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants." Pet.App.14a. The fact-specific Decision raises no issue meriting review by this Court.

Proceedings Below

This multidistrict litigation consolidated for pretrial proceedings twenty-eight actions alleging that Defendants had agreed to fix the prices of Digital Music and had engaged in related wrongs. Plaintiffs filed a Second Consolidated Amended Complaint (the "complaint") in the United States District Court for the Southern District of New York on June 13, 2007, alleging that Defendants' agreement violated Section 1 of the Sherman Act as well as the antitrust, trade regulation, consumer protection and common laws of numerous States and the District of Columbia.

On July 30, 2007, Defendants moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,

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[3] Defendants' factual assertions pertaining to two government investigations, offered herein for their truth, contradict the express allegations of the Complaint and must be disregarded on a Rule 12(b)(6) motion. C¶¶106-15;Pet.App.98a-99a. *See High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (Posner, J.) (fact that DOJ saves its limited resources and leaves enforcement to private bar raises no inference against claim of conspiracy).

for an order dismissing the complaint for failure to state a claim as to which relief may be granted. Defendants argued that the complaint failed adequately to plead an agreement to fix prices under the pleading standards enunciated by *Twombly,* and also raised certain other grounds applicable to the State law claims. Plaintiffs responded on September 13, 2007, arguing that *Twombly* and the Rule 8(a)(2) standards required only plausibility, not probability, and that the complaint satisfied the standard. Defendants replied on October 15, 2007, arguing for the first time that Plaintiffs had not adequately alleged that Defendants' significant parallel price increases for Internet Music in 2005 had occurred at a time when Defendants' costs of providing Internet Music had declined. With the district court's permission, Plaintiffs moved to amend paragraph 99 of the complaint to allege more details in this respect. Defendants opposed the motion.

The district court granted the motions to dismiss, interpreting *Twombly* to require that "factual enhancements" that tend to exclude the possibility of independent action "must appear in a § 1 plaintiff's complaint," Pet.App.42a, and holding that the complaint "does not allege the further facts required by *Twombly* to state a § 1 claim based upon parallel conduct." Pet.App.44a, 55a. The district court held that this also required dismissal of the State claims, Pet.App.55a-66a, and it denied as "futile" Plaintiffs' motion to amend. Pet.App.52a n. 14.

The Second Circuit vacated the judgment. The court set out the standards from *Twombly* and *Iqbal,* quoted extensively from both cases, and applied the "language and reasoning" of those cases to the facts of

the complaint, including the fourteen facts the Second Circuit enumerated above. It concluded that "[t]his complaint does not resemble those our sister circuits have held fail to state a claim under *Twombly*." Pet.App.17a-18a (citations omitted).

REASONS FOR DENYING THE PETITION

The Petition is a fatally flawed vehicle seeking the improper goal of judicial amendment of Rule 8. By not attempting to articulate a response to the complaint's critical allegations, the Defendants failed their burden under Rule 12(b)(6).

Defendants' assertion that the Second Circuit erred by not imposing a summary judgment plausibility pleading standard is meritless. In holding that Rule 8 of the Federal Rules of Civil Procedure requires an antitrust plaintiff to allege "enough factual matter (taken as true) to suggest that an agreement was made," *Twombly*, 550 U.S. at 556, this Court made clear that: "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (citation and internal quotation marks omitted). The lower courts have uniformly understood and applied the "plausible pleading" standard announced by this Court in *Twombly* and *Iqbal* as not imposing a "probability" requirement.

The Second Circuit correctly quoted, followed and applied this Court's standards to the extensive, detailed facts pleaded in the complaint. In arguing that complaints must allege facts which "tend to exclude" independent action, Defendants seek the same plausibility standard which Defendants' counsel successfully (and correctly) argued in a different case was expressly disclaimed in *Twombly*. Superimposing onto *Twombly* the "*Matsushita* 'tends to exclude' standard for summary judgment," Petition at 17 n. 3,[4] Defendants seek to create precisely the "probability requirement" that *Twombly* rejected.

Finally, by posing a new question seeking an even broader ruling than they sought below, and by citing a securities case which they did not cite below, Defendants have without justification asked this Court to consider the question in the first instance, which the Court should decline to do.

Thus, it is the Petition, not the Decision, which conflicts with *Twombly*.

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[4] *Twombly* described the standard as requiring that on summary judgment, "a § 1 plaintiff's offer of conspiracy evidence must "tend to rule out the possibility that the defendants were acting independently." 550 U.S. at 554 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 752 (1984)); *see also id.* (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 564 U.S. 752 (1984) ("proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action").

I. DEFENDANTS' FAILURE TO ARTICULATE AN EXPLANATION FOR THEIR CHIEF EXECUTIVES' ADMISSIONS DID NOT SATISFY THEIR BURDEN ON THE MOTIONS TO DISMISS, AND THE DENIAL OF THOSE MOTIONS RAISES NO ISSUE FOR REVIEW

The Second Circuit noted allegations that two of Defendants' chief executives had made admissions suggestive of a prior illegal agreement: that Defendants had formed joint ventures to "determine" and control prices, and that MFN agreements would be kept secret for "legal/antitrust reasons." Pet.App.16a-17a. Defendants never tried to articulate how either of those admissions could be probative of independent self-interested conduct.

Challenges to a complaint for failure to state a claim are ordinarily made, as they have been made here, under Fed.R.Civ.P. 12(b)(6). *See Bell v. Hood*, 327 U.S. 678, 682 (1946). Under Rule 12(b)(6), the moving defendant bears the burden of showing that no claim has been stated. *E.g.*, *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991); 5B Charles Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2010 supp.) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists."). Rule 12(b)(6) thus provides procedural protections to the plaintiff which "alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the

requirements of a valid legal cause of action." *Neitzke v. Williams*, 490 U.S. 319, 329-30 (1989).

Defendants made no effort to articulate a response to key allegations of the complaint and thus failed their movants' burden under Rule 12(b)(6). Defendants' failure independently sustains the Decision, and the Petition presents no issue for this Court's review.

II. THE SECOND CIRCUIT'S CORRECT APPLICATION OF THIS COURT'S RULE 8 DECISIONS TO THE ROBUST FACTUAL ALLEGATIONS OF THE COMPLAINT PRESENTS NO ISSUE FOR REVIEW

No court has adopted Defendants' argument that *Twombly* and *Iqbal* changed Rule 8(a)(2)'s "short and plain statement of the claim showing that the pleader is entitled to relief" to require, on a Rule 12(b)(6) motion, that the complaint allege facts sufficient to "satisfy the same substantive legal standard that applies at summary judgment or trial." Petition at 15. Pasting together isolated words and phrases from *Twombly, Iqbal* and *Dura*, both Defendants' newly proposed standard and their proposed "tends to exclude" standard amount to the very "probability" standard disclaimed in *Twombly* and *Iqbal*. The court so held in *Flying J, Inc. v. TA Operating Corp.*, No. 1:06-CV-30-TC, 2007 WL 4165749 at *2 (D.Utah Nov. 20, 2007), denying defendants' Rule 12(c) motion and rejecting defendants' argument for a "tends to exclude" standard as "contrary to the language of *Twombly*" and

that case's express disclaimer that it was imposing a "probability" standard.[5]

The Second Circuit painstakingly quoted and correctly applied the *Twombly* and *Iqbal* standards to the very extensive and robust fact allegations of the complaint --- including fact allegations which negated any lawful explanation for Defendants' conduct and which Defendants, in three sets of briefs below, conspicuously failed to mention, let alone try to explain. The Petition presents no issue meriting this Court's review.

A. The Second Circuit Correctly Applied This Court's Rule 8 Standards to the Robust Allegations of the Complaint

Unable to avoid the complaint's non-conclusory fact allegations[6] of conduct placed in a "context that raises a suggestion of a preceding agreement," *Twombly*, 550 U.S. at 557, Defendants argued that *Twombly* required a Section 1 plaintiff to allege facts that "tend[] to exclude independent self-interested conduct as an

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[5] Defendants' counsel in this case successfully argued in *Flying J* that *Twombly* **did not adopt** a standard requiring plaintiffs to allege "additional facts that tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." Plaintiffs' Memorandum in Opposition to TA's and Pilot Defendants' Motion for Judgment on the Pleadings at 7-9, submitted in *Flying J, Inc. v. TA Operating Corp.*, No. 1:06-CV-30-TC, Doc. No. 157 (D.Utah, Aug. 20, 2007).

[6] The Second Circuit did not accept as true those of the complaint's allegations that it considered were "no more than conclusions." Pet.App.3a n. 1 (citing *Iqbal*, 129 S.Ct. at 1949-50); *see also id.* at 6a n.2 (rejecting allegation as conclusory).

explanation for defendants' parallel behavior." Pet.App.18a. The Second Circuit properly rejected the argument.

> This is incorrect. Although the *Twombly* court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action, 550 U.S. at 554, 127 S.Ct. 1955, and that the district court below had held that plaintiffs must allege additional facts that tended to exclude independent self-interested conduct, *id.* at 552, 127 S.Ct. 1955, it specifically held that, to survive a motion to dismiss, plaintiffs need only [allege] 'enough factual matter (taken as true) to suggest that an agreement was made,' *id.* at 556, 127 S.Ct. 1955; *see also* 2 Areeda & Hovenkamp [ANTITRUST LAW] § 307d1 (3d ed. 2007) ('[T]he Supreme Court did ***not*** hold that the same standard applies to a complaint and a discovery record.... The "plausibly suggesting" threshold for a conspiracy complaint remains considerably less than the "tends to rule out the possibility" standard for summary judgment.').

Id. (emphasis in original).[7]

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[7] Defendants' counsel in this case has written that the existence of scholarly opinion, most particularly from the Areeda-Hovenkamp treatise, "appears to be one of the most important factors in the Court's decision whether to grant certiorari in an antitrust case." Thomas G. Hungar and Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, ANTITRUST (Vol. 23, No. 2, Spring 2009) at 54-55, available at http://www.gibsondunn.com/publications/Documents/Hungar-AppellateAdvocacyInAntitrustCases.pdf.

Contrary to Defendants' unsupported argument that the court adopted "an amorphous consideration of 'context' unmoored to the correct legal standard," Petition at 22, the Second Circuit correctly applied *Twombly*'s requirement for "context."

> [A]n allegation of parallel conduct coupled with only a bare assertion of conspiracy is not sufficient to state a Section 1 claim. [*Twombly*, 550 U.S. at 556]. Instead, allegations of parallel conduct 'must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.' *Id.* at 557, 127 S.Ct. 1955.

Id. at 12a. The Second Circuit scrupulously followed "the language and reasoning" of *Twombly* in applying those standards to the facts alleged. *Id.* at 14a. The court correctly found that particular allegations place the parallel conduct in the required context. *Id.* at 12a, quoting *Twombly*, 550 U.S. at 557. In consideration of Defendants' failure to offer any "obvious alternative explanation" in response to Plaintiff's allegations, *see* Point II.E. *infra*, the court also correctly concluded that "in this case plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals.'" Pet.App.24a (citations omitted).

B. The Second Circuit Correctly Determined That *Twombly* Did Not Impose a Summary Judgment Standard on Motions to Dismiss

Defendants' insistence that *Twombly* applied the summary judgment standard in dismissing an

antitrust complaint under Rule 8, Petition at 14, denies the plain language of the decision. *Twombly* required not that plaintiffs allege facts which "tended to exclude" independent conduct, but rather that they allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. at 556. *Twombly* endorsed Rule 8's "general standards," *id.*,[8] including accepting the well-pleaded allegations as true (whether or not they are believed) and drawing all reasonable inferences from such allegations in favor of plaintiffs. Although it did not require "particularity," *Twombly* required pleading "more than labels and conclusions" in support of grounds that "raise a right to relief above the speculative level." *Id.* at 555-56.

Twombly's new "gloss" on the well-settled standards of Rule 8(a)(2) did not include any requirement that a plaintiff plead facts tending to negate the possibility that defendants had acted from their independent self-interest rather than from agreement to divide markets in violation of Section 1 of the Sherman Act:

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. **Asking for plausible**

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[8] For example, *Twombly* did not disturb Rule 8(a)(2)'s requirement that a complaint provide only "'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (collecting cases).

> **grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.** And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'

Id. at 556 (emphasis supplied) (footnote omitted), quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A plaintiff's allegations need only raise a plausible, not probable, inference of agreement in order to permit the case to go forward. *Twombly* also confirmed that Rule 8(a)(2) requires no heightened degree of pleading particularity, and that the heightened standard of Federal Rule 9(b) does not apply in determining whether a Section 1 claim has been stated. *Id.* at 569 n. 14 (broadening the scope of Rule 9 "can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation'"). Defendants' argument that *Twombly* raised the motion-to-dismiss standard to that for submitting evidence on summary judgment thus finds no support in *Twombly*.

Defendants misconstrue this Court's discussion of the *Twombly* district judge's use of the term "plus factors" to augment bare allegations of parallel conduct:

> The Court also noted that Judge Lynch, who authored the district court opinion in *Twombly*, 'understood that allegations of parallel business

> conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'" *Id.* at 552 (citation omitted).

Petition at 14. The citation omitted by Defendants was to the district court's decision in *Twombly v. Bell Atlantic Corp.*, 313 F.Supp.2d 174, 179 (S.D.N.Y. 2003), where the district court actually said:

> **In the summary judgment context,** the Second Circuit requires plaintiffs to **present evidence** suggesting that the defendants' parallel conduct has resulted from an agreement rather than 'merely from independent ... conduct by firms acting in their own self-interests.' *Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 255 (S.D.N.Y.1995) (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir.1987)). Plaintiffs may satisfy this standard by **establishing at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior**. The plus factors include **evidence** that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire. *Apex Oil*, 822 F.2d at 253-54.

313 F.Supp.2d at 179 (emphasis supplied). By his express qualifier to "the summary judgment context," and by the citation to the *Apex Oil* summary judgment decision, it is clear that then-District Judge Lynch

"understood" that the "tends to exclude" standard referred to evidence submitted on motions for summary judgment. *See also id.* at 179-80 (separate and distinct from summary judgment, district courts in the Second Circuit have required antitrust plaintiffs asserting parallel conduct conspiracies to "allege plus factors" in order to withstand motions to dismiss; where plaintiffs "allege parallel action that **could be** the result of a conspiracy . . . plaintiffs are entitled to [go forward and] explore in discovery. . . .") (emphasis supplied).

This Court's citation to the district court's *Twombly* decision does not suggest a heightened standard requiring the pleading of evidentiary "plus factors." Indeed, that term is virtually absent from *Twombly*. *Twombly* holds that a Section 1 complaint alleging parallel conduct must also contain "additional facts," 550 U.S. at 552, 570, or some "further circumstance," *id.* at 557, in order to provide plausible grounds for inferring the agreement which makes the parallel conduct unlawful. Because bare allegations of parallel conduct do not without more suggest conspiracy, such "additional facts" are necessary at the pleading stage in order adequately to notify the defendant of the nature of the claim. *Id.* Thus, *Twombly* stated that the district court had "correctly understood" that requiring that "further circumstances" be alleged did not run counter to the rule, reemphasized in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), that imposing a higher pleading standard under Rule 8 "was contrary to the Federal Rules' structure of liberal

pleading requirements." 550 U.S. at 570, citing *Twombly*, 313 F.Supp.2d, at 181.[9]

Defendants fail to distinguish *Swierkiewicz*. The fact that *Swierkiewicz* predated *Twombly* is irrelevant, since *Twombly* expressly reaffirmed *Swierkiewicz*. 550 U.S. at 570. Defendants' suggestion that *Swierkiewicz*'s holding is limited to plaintiffs relying on direct evidence is refuted by the plain language of the decision, which rejects different pleading requirements "at the time of his complaint" for plaintiffs who might ultimately use direct evidence and plaintiffs who might ultimately use circumstantial evidence.

> Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the

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[9] Contrary to Defendants' argument, the *Twombly* dissent, while apparently disagreeing with the majority's assessment of the plausibility of the complaint before the court, does not state that the majority applied a summary judgment standard to the complaint. *Compare Twombly*, 550 U.S. at 586 (Stevens, J., dissenting) ("I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy.") *with Iqbal*, 129 S.Ct. at 1960 (Souter, J., dissenting) ("Iqbal's complaint therefore contains 'enough facts to state a claim for relief that is plausible on its face.'") (citation omitted).

> merits if direct evidence of discrimination is discovered.

534 U.S. at 511-12.

In sum, *Twombly*'s requirement that a Section 1 plaintiff allege facts which provide fair notice of his claim and plausible grounds of his entitlement to relief, does not impose a requirement that a plaintiff plead evidence which tends to exclude (or eliminates the possibility of) independent self-interested conduct as an explanation for defendants' parallel behavior.

C. The Second Circuit Correctly Determined That *Iqbal* Did Not Impose a Summary Judgment Standard on Motions to Dismiss

Iqbal, a civil rights case, made explicit that application of the *Twombly* "plausible pleading" standard was not limited to antitrust complaints. 129 S.Ct. at 1953. Contrary to Defendants' arguments, however, *Iqbal* does not require a summary judgment pleading standard. Plaintiffs in *Iqbal* challenged the constitutionality of their pretrial confinement after they had been classified as persons of "high interest" because of their suspected links to the September 11 attacks. They asserted that the challenged detention policies purposefully discriminated against Arab Muslim defendants on prohibited grounds. Although the well-pleaded allegations of the complaint are deemed to be true on a Rule 12(b)(6) motion, the Court deemed plaintiffs' allegations that the Attorney General and the director of the FBI "willfully and maliciously agreed" to subject plaintiffs to harsh conditions of confinement conclusory, and therefore not entitled to the presumption of truth. Absent those

allegations, the majority held that plaintiffs had not stated a plausible claim. *Iqbal* thus explained *Twombly* as holding that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged....Determining whether a complaint states a claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1949-50.

Defendants misstate *Iqbal*'s description of *Twombly*'s holding to be as follows: "Because the plaintiffs' allegations of parallel conduct failed to exclude 'lawful, unchoreographed free-market behavior,' the complaint 'did not plausibly suggest an unlawful agreement.'" Petition at 14, citing *Iqbal*, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 567, 570). *Iqbal* neither required, nor construed *Twombly* to require, that a complaint "exclude" anything. Rather, *Iqbal* described the parallel conduct allegations in *Twombly* as "more likely explained by" lawful behavior under the long-standing business environment in the telecommunications industry. *Iqbal*, 129 S.Ct. at 1950. *Iqbal*'s characterization of the *Twombly* defendants' conduct as "more likely explained by" lawful behavior was, again, not announcing a "probability" requirement. Rather, the Court was making a common sense observation that the *Twombly* defendants, previously prohibited from each others' markets, could not by their **parallel inaction** in a changed regulatory environment be plausibly inferred to be conspiring. *Twombly*, 550 U.S. at 566. There thus existed "an obvious alternative explanation" for defendants' inaction. *Id.* at 567.

Defendants seize upon the snippet "[i]t follows," constructing a facially flawed argument that "it follows" from *Iqbal*'s citation to summary judgment decisions that it was applying the summary judgment evidentiary standard to the complaint's allegations on a motion to dismiss. Petition at 15, quoting 129 S.Ct. at 1948-49. *Iqbal*, however, also made clear that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S.Ct. at 1949, citing *Twombly*, 550 U.S. at 556. Thus, as the parallel conduct alleged in *Twombly* remained, without more, in "neutral territory," 550 U.S. at 557, so the conduct alleged in *Iqbal* did not provide due notice of the claim and its grounds under Rule 8, unless facts were alleged "plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin." 129 S.Ct. at 1952. It plainly does not "follow" that the Court was requiring satisfaction of the summary judgment evidentiary standard by requiring plaintiff to plead "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949.

D. Should the Court Consider Defendants' New-Found Reliance on a Securities Fraud Case, That Case Did Not Impose a Summary Judgment Standard on Motions to Dismiss

In light of Defendants' failure to cite or present any argument regarding *Dura Pharmaceuticals* to any court below, this Court should follow its usual practice and decline to consider it now. *See* Point III *infra*. Should the Court consider *Dura*, that case provides no

support for the summary judgment pleading standard Defendants seek here.

Dura, a case brought under the elevated pleading standards of the Private Securities Litigation Reform Act, held that plaintiffs' allegation of share purchases at an inflated price insufficiently alleged proximate causation. *Dura* did not impose a summary judgment standard at the pleading stage, or "any special further requirement in respect to the pleading of proximate causation or economic loss" under Rule 8. *Dura*, 544 U.S. at 346. Rather, the Court considered the "pure logic" of share transactions to be that any loss occurs not at the time of the inflated-priced purchase but at the lower-priced sale, which lower price may reflect, in whole or in part, facts or conditions not suggestive of wrongdoing. *Id.* at 342-43. Thus, a securities complaint does not provide defendants with "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *id.* at 346 (citation omitted), if it fails to plead "some indication of the loss and the causal connection that the plaintiff has in mind." *Id.* at 347 (citing *Swierkiewicz*, 534 U.S. at 513-15). This again is hardly "a substantive legal standard that will govern the claim at summary judgment or trial."

E. Although Defendants Complain that the Second Circuit Failed to Consider "Obvious Alternative Explanations" for Their Conduct, Defendants Never Offered Such Explanations

Defendants argue that the Second Circuit erroneously failed to test the plausibility of the complaint's allegations against "obvious alternative explanations" for defendants' conduct. Petition at 19-

22. But the Second Circuit was well aware of *Twombly*'s requirements and concluded that "in this case plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals.'" Pet.App.24a (citations omitted). Defendants' real grievance is not that the Second Circuit failed to consider obvious alternative explanations; it is that the court disagreed that Defendants had offered any. Such disagreement with factual findings does not provide a good ground for granting the writ of certiorari. *See* Rule 10, Rules of the Supreme Court of the United States.

Defendants have never explained why their interest in combating illegal downloading of music on the Internet, a subject which does not appear in the complaint,[10] provided an "obvious alternative explanation" for their conduct. Considering such alternatives within the context of the complaint requires a court "to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. In order for an explanation to be an "obvious alternative," it must at a minimum comport with common sense.

Defendants uniformly imposed supracompetitive prices and onerous DRM terms, by which consumers were restricted in their downloading, copying and use of Defendants' Internet Music and, after a period, could actually lose access to those downloads. C¶¶74-77;Pet.App.87a-89a. The common sense effect of

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[10] The district court thus had to reach outside the complaint to consider "an environment of widespread unauthorized downloading of Internet Music." Pet.App.44a-45a & nn. 9, 10.

Defendants' conduct was not to combat illegal downloading, but to drive customers away from Defendants' Internet Music. Defendants have not explained how their alleged conduct made economic or common sense as a response to "Internet piracy." C¶¶75-82;Pet.App.87a-90a. Rather, the idiosyncratic and unpopular terms uniformly imposed by Defendants made economic sense as creating an incentive for consumers to refrain from purchasing Defendants' Internet Music and instead to purchase Defendants' Digital Music on CDs, a more profitable medium. C¶¶66,82,105;Pet.App.85a,90a,97a-98a.

Indeed, the admission by one of Defendants' chief executives that the joint ventures were formed to control prices demolishes any obvious alternative explanation, at least for the activities of the MusicNet and pressplay joint ventures. Pet.App.16a. Another chief executive's direction that his company's MFN agreements with the joint ventures be put in "secret side letters" raises a plausible inference that Defendants knew of antitrust concerns regarding their entry into seller-side "most favored nations" agreements, which one neutral observer called "inherently price-increasing and anticompetitive." Pet.App.16a-17a. Defendants have never offered an explanation which would explain why they even needed joint ventures to effectuate their agreement.

The Second Circuit followed this Court's standards in determining that the inferences to be drawn from Defendants' alleged conduct was that it "plausibly contravene[d]" each Defendant's self-interest in the absence of similar behavior by rivals. Pet.App.24a. The court drew this inference not, as Defendants assert, "based on the opinion of a single industry

commentator," Petition at 21-22, 25, but after a careful review of all Defendants' alleged admissions and conduct which made Defendants' own Internet Music business unpopular. Rather than intended to address illegal downloading, Defendants' conduct was, as the Second Circuit correctly concluded, plausibly suggestive of a prior agreement to impose non-competitive terms and conditions on Internet Music, which each Defendant could not have accomplished separately, to benefit their more lucrative CD business. Pet.App.24a.

III. BECAUSE DEFENDANTS FAILED TO RAISE OR LITIGATE BELOW THE SOLE QUESTION THEY PRESENT HERE, THE COURT SHOULD FOLLOW ITS USUAL PRACTICE AND DECLINE TO CONSIDER IT

Having failed to carry their burden below, Defendants now present a single question, which they have never previously raised: "whether the court of appeals erred in holding that a complaint can state a claim without alleging sufficient facts that, if proved, plausibly show an entitlement to relief under the substantive legal standard that will govern the claim at summary judgment or trial." Defendants offer as their first authority *Dura Pharmaceuticals,* a case they never cited below. Although *Dura* does not support any argument Defendants make here (*see* Point II.D. *supra*), this Court should follow its usual practice and decline to decide questions not raised or litigated in the first instance in the lower courts. *See Springfield v. Kibbe*, 480 U.S. 257, 258 (1987); *F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 23 n. 6 (1983).

Defendants' new question misstates the Decision, which rejected the argument Defendants had actually made: that *Twombly* requires a plaintiff to allege facts that "tend[] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." Pet.App.18a. The Second Circuit held (and the leading commentators have agreed) that *Twombly*'s requirement that a plaintiff allege "enough factual matter (taken as true) to suggest that an agreement was made" is a lesser standard than requiring summary judgment evidence that "tends to exclude" independent conduct. *Id.* (citing *Twombly*, 550 U.S. at 556 and 2 Areeda & Hovenkamp § 307d1 (3d ed. 2007); *see* Point II.A. *supra*.

Defendants' new question goes even further to ask whether, at the time of the complaint, a plaintiff must under *Twombly* not only allege facts which "tend to exclude" the possibility that defendants acted independently, but allege all the facts he will need to prove at trial on the merits. No court has so held, and certainly Defendants have cited no authority which would support such a pleading requirement. Defendants have offered no excuse for their failure to allow consideration of this question by the court of appeals, and this Court should decline to consider it.

IV. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Defendants have not demonstrated that the Decision conflicts with that of any circuit court. Indeed, Defendants have not cited to any court holding that Rule 8 "require[s] a plaintiff to allege those facts

in a complaint that the plaintiff will later need to substantiate at summary judgment or prove at trial." Petition at 12. No court has so held.

Tam Travel

Defendants assert that the Sixth Circuit's decision in *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896 (6th Cir. 2009), which alleged an antitrust conspiracy of airlines to reduce, cap and eliminate commission payments to travel agents, conflicts with the Decision. But, as Defendants correctly state, *Tam Travel* did not hold that a complaint must be evaluated under the "tends to exclude" standard. Rather, as Defendants acknowledge, the Sixth Circuit said only that the *Matsushita* "tends to exclude" standard can "illuminate[] the plausibility" of antitrust conspiracy allegations. Petition at 23. The Sixth Circuit's "illuminate" observation appears in a discussion of a summary judgment decision and is accompanied by a reminder that "[h]ere, our review is constrained by Fed.R.Civ.P. 12(b)(6)." 583 F.3d at 907 n. 7. *Tam Travel* thus did not endorse a standard of "tending to exclude 'reasonable, alternative explanations'" in dismissing the complaint. Petition at 23. Rather, the Sixth Circuit actually held as follows:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.'

Id. at 908 (quoting *Iqbal*, 129 S.Ct. at 1950). The actual holding thus used language taken directly from *Iqbal* and *Twombly*, rather than the "tending to exclude" formulation for summary judgment, and raises no conflict with the Decision.

Nor is *Tam Travel*'s use of *Iqbal*'s description of defendants' conduct as "more likely explained by" independent behavior an adoption of the probability/summary judgment standard expressly disclaimed in *Twombly and Iqbal.*[11] As used in *Iqbal*, the phrase again refers to Defendants' conduct being in "neutral territory," according to evidence available by reason of the fact that *Tam Travel* was brought by plaintiffs who had opted out of the putative class in *Hall v. United Air Lines, Inc.*, 296 F.Supp.2d 652 (E.D.N.C. 2003). *Tam Travel*, 583 F.3d at 900 n. 3. The Sixth Circuit noted that defendants had won summary judgment in *Hall*, after the district court

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[11] The Sixth Circuit described its standard of review as

> recogniz[ing] that *Interstate Circuit* [*v. United States*, 306 U.S. 208 (1939)] was decided at a more advanced stage of the legal process, and we do not suggest that the same standards ought to be applied on a motion to dismiss, even under *Twombly*. However, plaintiffs argue that they have alleged enough factual matter 'to raise a reasonable expectation that discovery will reveal' circumstantial 'evidence of illegal agreement,' *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955, analogous to the circumstantial evidence discovered in *Interstate Circuit*. Thus, we examine plaintiffs' complaint with an eye to any factual allegations that would make it 'reasonable' to 'expect [ ]' that similar circumstantial evidence would surface during discovery. *Id.*

583 F.3d at 906 n. 6. There is no conflict with the standard used by the Second Circuit in the Decision. Pet.App.12a, 15a n. 3.

reviewed a fully developed record (also available to the *Tam Travel* plaintiffs) and found "overwhelmingly compelling evidence that the commission cuts and caps . . . were just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by plaintiffs." 583 F.3d at 908 n. 8, quoting *Hall*, 296 F.Supp.2d at 671, *aff'd sub nom. Hall v. American Airlines, Inc.*, 118 Fed. Appx. 680 (4th Cir. 2004). The Sixth Circuit noted that

> Although a district court decision affirmed by the Fourth Circuit is not authoritative in the Sixth Circuit, we think that the result in *Hall* is something we should at least consider (when analyzing plausibility), 'both for its persuasive power, and because it involves the same facts.' *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367 (7th Cir.1987) (citation omitted) (considering Fourth Circuit decision in antitrust action involving defendants whose activities spanned more than one court of appeals). We also acknowledge the Seventh Circuit's statement in *Premier*, which warned, '[o]nly the gravest reasons should lead [a] court in [an] opt-out suit to come to a conclusion that departs from that in the class suit.' *Id.* at 367-68.

583 F.3d at 909 n. 8. Nothing in *Twombly* or *Iqbal* required the Sixth Circuit to ignore the "overwhelmingly compelling evidence" from the earlier class action. Such evidence obviously "illuminated the plausibility" of plaintiffs' claims, based on the same facts, on the motion to dismiss in the *Tam Travel* opt-out case. *Tam Travel*'s unusual procedural posture, which constrained the Sixth Circuit from reaching a

different result from that in the earlier class case except for the "gravest reasons," makes *Tam Travel* an especially poor vehicle for arguing for a "probability" standard under Rule 8.

Nor have the lower courts been "confused" by the decisions of the Second and Sixth Circuits. A district court in the Second Circuit recently dismissed an antitrust case as lacking the "robust parallel conduct allegations coupled with robust indicia of a preceding price-fixing agreement" pleaded in this case, comparing the allegations in the case before it to those in *Tam Travel*. *Anderson News, L.L.C. v. American Media, Inc.*, No. 09 Civ. 2227, 2010 WL 3001746 at *7-9 (S.D.N.Y. Aug. 2, 2010); *see also id.* at *4 ("At the pleading stage--as opposed to summary judgment stage--an antitrust complaint does not have to tend to rule out the possibility that the defendants were acting independently.") (citing *Twombly*, 550 U.S. at 556). A district court in the Sixth Circuit recently distinguished *Tam Travel* in part as an opt-out suit constrained to follow the outcome in the class action except for the "gravest reasons," and stated that in any event "*Twombly* did not purport to place on a plaintiff alleging an antitrust conspiracy claim a summary judgment standard at the pleading stage." *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 2671306 at *9 (E.D.Mich. July 1, 2010).

Insurance Brokerage Antitrust

Defendants assert not that *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) is in conflict with the Decision, but that the case "attempts to chart a middle course" between the Second and Sixth Circuits. Neither contention has

merit. *Insurance Brokerage* involved allegations primarily of vertical "hub and spoke" conspiracies to allocate markets among favored insurance carriers. *Id.* at 318-19. From the 83-page opinion Defendants extract a single phrase, stating that a plaintiff relying on parallel conduct must allege at least one "plus factor," as adopting the summary judgment standard on a motion to dismiss. Petition at 25, quoting *Insurance Brokerage*, 618 F.3d at 323, quoting in turn the appeal of summary judgment in *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir.2004).

In light of *Insurance Brokerage*'s extended discussion of *Twombly*, the "plus factor" reference does not support an assertion of conflict or even a "middle course." *E.g.*:

- 618 F.3d at n. 21 ("the standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct," which Defendants ineffectively dismiss as a "cryptic observation," Petition at 25 n. 6);

- *id.* (*Twombly*'s plausibility formulation calling for "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," 550 U.S. at 556, "appears to support" Judge Newman's concurring opinion in this case that even allegations insufficient to go to the jury may still allow some discovery to go forward);

- *id.* at 324 n. 24 ("Sometimes, of course, discovery will uncover both direct and circumstantial evidence of agreement. We do not imply that a plaintiff must commit to a

single method of proof at the pleading stage, but merely that a plaintiff must put forth **some** statement of facts suggestive of unlawful conspiracy.") (emphasis in original);

- *id.* at 337 n. 35, citing 550 U.S. at 556 ("We note that, under *Twombly,* the test is not whether plaintiffs' allegations **necessarily** amount to an unlawful horizontal agreement, but rather whether they plausibly imply-that is, 'raise a reasonable expectation that discovery will reveal evidence of'-such an agreement.") (emphasis in original); and

- *id.* at 341 n. 42 ("As the Supreme Court reiterated in *Iqbal*, the *Twombly* standard does not impose a 'probability requirement.'") (citations omitted).

Rather than introduce "confusion and uncertainty," Petition at 27, *Insurance Brokerage* followed the *Twombly* standards and, by its own acknowledgement, found support in those standards for even the Second Circuit's concurrence in this case.

Braden

In *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), the Eighth Circuit reversed the dismissal of an action charging ERISA fiduciaries with breach of duty in selecting Plan investments, finding errors by the district court in ignoring reasonable inferences and in drawing inferences adverse to the non-movant. *Id.* at 595. In language only partially excerpted in the Petition (at 26), the court stated that

> there may well be lawful reasons appellees chose the challenged investment options. It is not Braden's responsibility to rebut these possibilities in his complaint, however. The district court erred by placing that burden on him, finding the complaint inadequate for failing to rule out potential lawful explanations for appellees' conduct. It stated that appellees 'could have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility.' That may be so, but Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct.

Id. at 596. However, as in *Iqbal*, where there existed what in judicial experience and common sense were "more likely explanations" for defendants' conduct, a plaintiff may need to rule out [such] alternative explanations." 588 F.3d at 595-97.

> Such a requirement is neither a special rule nor a new one. It is simply a corollary of the basic plausibility requirement. An inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.

Id. at 597. None of this presents a conflict in light of the Second Circuit's application of the correct standards to the complaint's allegations, especially considering Defendants' inability to offer an "obvious

alternative explanation" for their conduct. *Braden* provides no reason for this Court to grant review here.

V. DEFENDANTS FAIL TO DEMONSTRATE IMPORTANT AND RECURRING ISSUES RAISED BY THE SECOND CIRCUIT'S FACT-INTENSIVE DECISION WHICH REQUIRE RESOLUTION BY THIS COURT

Defendants reflexively warn that the Decision "will subject defendants to costly, protracted Sherman Act litigation based on nothing more than lawful conduct that is common in dynamic markets." Petition at 29. Rather than being a harbinger of "unwarranted discovery" precipitated by "deficient" and "bare-bones complaints," *id.* at 28-31, however, the Decision has been positively received as a rigorous application of this Court's Rule 8 jurisprudence applied to a fact-intensive complaint. *E.g.*, Michael B. Miller, *Clearing the Twombly Pleading Hurdle: 'Starr' Complaint Succeeds But Decision Shows Just How Strict the Standard Is*, N.Y.L.J. at S8, col. 1 (Vol. 243, June 14, 2010) (while finding that the complaint herein satisfied *Twombly*, "the Second Circuit seemed to emphasize how demanding that standard has become, rather than suggest that it is likely to be relaxed as the *Twombly* progeny grows").

> In fact, however, when one considers the scope and breadth of the factual allegations included in the *Starr* complaint, and the pains the Second Circuit took to both carefully list out the categories of relevant allegations one by one and as part of a cohesive narrative, practitioners might well conclude that *Starr* is a demonstration of just how strict the *Twombly*

> standard is proving to be in practice, not how 'lax' it might become.

Id. The author, who represents antitrust defendants, concludes that the court of appeals' decision should not be read as an attempt to "soften *Twombly*'s impact."

Indeed, empirical evidence shows not that *Twombly* is being loosely enforced, but that motions to dismiss are being granted with greater frequency since *Twombly* and *Iqbal* were decided.

> A recent study of randomly selected federal civil cases (all cases, not just antitrust) found that, pre-*Twombly*, Rule 12(b) (6) motions were granted 46 percent of the time; post-*Iqbal* that number had increased to 56 percent. The study's author took the analysis a step further, conducting a 'multinomial logistic regression' that indicated a Rule 12(b)(6) motion under *Twombly* was 1.81 times more likely to be granted with leave to amend rather than denied than under *Conley* [*v. Gibson*, 355 U.S. 41 (1957)], and under *Iqbal* those odds increased to more than four times greater than under *Conley*.

Id. (citing Patricia Hatmayer, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* 59 AM. U. L. REV. 553, 556 (2010)).

Defendants fail to demonstrate any recurring issues arising from the fact-bound Decision requiring resolution by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 22, 2010

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